

**Days Inn Management Co., Inc. and Local 217,  
Hotel and Restaurant Employees and Bar-  
tenders Union, AFL-CIO.** Cases 39-CA-3393  
and 34-RC-719

January 21, 1992

**SUPPLEMENTAL DECISION AND ORDER ON  
REMAND AND CERTIFICATION OF  
RESULTS OF ELECTION**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On September 20, 1990, the National Labor Relations Board issued its Decision, Order, and Direction of Second Election<sup>1</sup> in this proceeding. The Board found, *inter alia*, that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by threatening to reduce employee wages if the Union won the Board election held on February 25, 1987, and by creating the impression of keeping employee organizational activity under surveillance on election day. The Board also found that the election-day surveillance constituted objectionable conduct interfering with the conduct of the election and directed a second election. In so doing, the Board specifically found it unnecessary to pass on the judge's findings that the Respondent did not violate the Act and interfere with the election on the basis of its alleged surveillance of union activity in February 1987.

The Respondent thereafter filed a petition for review of the Board's Order with the United States Court of Appeals for the Second Circuit and the Board filed a cross-application for enforcement. On April 10, 1991, the court issued its opinion granting in part and denying in part enforcement of the Board's Order and remanding the case to the Board for further proceedings consistent with the court's opinion.<sup>2</sup> In this regard, the court enforced the Board's finding of a violation concerning the threat, but declined to enforce those portions of the Board's Order concerning the election-day surveillance and requiring a new election. The court did not pass on the issues involving the alleged surveillance of union activity by the Respondent in February 1987.

On June 17, 1991, the Board advised the parties that it had accepted the remand and invited the parties to submit statements of position with respect to the issues raised by the remand. Thereafter, the General Counsel and the Respondent filed statements of position.

<sup>1</sup> 299 NLRB 735.

<sup>2</sup> 930 F.2d 211 (2d Cir. 1991).

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reconsidered this case in light of the court's opinion, which we consider the law of the case, and the parties' statements of position, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

As previously indicated, in our original decision the Board, and consequently the court, did not pass on the question whether the Respondent also violated Section 8(a)(1) of the Act and interfered with the February 25, 1987 election, as alleged, by observing the Union's organizational activity conducted on the public sidewalk in front of the Respondent's hotel in February 1987. For the reasons stated by the judge, we adopt his dismissal of this 8(a)(1) allegation and his recommendation that the corresponding election objection be overruled.<sup>3</sup> Accordingly, we shall issue a certification of results of the election.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Days Inn Management Co., Inc., Bridgeport, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

**CERTIFICATION OF RESULTS OF ELECTION**

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Local 217, Hotel and Restaurant Employees and Bartenders Union, AFL-CIO, and that it is not the exclusive representative of the bargaining unit employees.

<sup>3</sup> We disagree with the conclusion our colleague draws from the relevant facts. In this regard, every day for at least the month prior to the election the Union campaigned in plain view on public property adjacent to the Respondent's facility. On four or five of those occasions the Respondent's supervisors also campaigned at that location by greeting employees on public property nearby. These supervisors did not engage in any photographing of employees, note-taking, or conversations with the union representatives. Nor did they visibly disrupt any contact with the Union or physically block or impede any employee's access to the union representatives. There is no evidence that they were able to overhear conversations between employees and union representatives. We thus agree with the judge that the sum total of the conduct of the Respondent's representatives cannot be distinguished from mere observation of open conduct and in these circumstances does not constitute unlawful surveillance of union organizing under current Board law.